

Louisiana Law Review

Volume 18 | Number 1

The Work of the Louisiana Supreme Court for the

1956-1957 Term

December 1957

Public Law: Local Government

Alvin B. Rubin

Repository Citation

Alvin B. Rubin, *Public Law: Local Government*, 18 La. L. Rev. (1957)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol18/iss1/28>

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such finding and its basis in the rules issued) that such procedures were impracticable, unnecessary, or contrary to the public interest.³⁷ This federal provision obviously contains at least the minimum requirement that a federal agency must make a considered decision as to whether public or *ad hoc* rule-making shall be utilized and must publicly justify that decision. The Model State Administrative Procedure Act provides that "prior to the adoption of any rule authorized by law, or the amendment or repeal thereof, the adopting agency shall as far as practicable, publish or otherwise circulate notice of its intended action and afford interested persons opportunity to submit data or views orally or in writing."³⁸

Having decided that the agency had the power to change its rules *ad hoc*, the court further found there was nothing in the record "to indicate that they did not act in accordance with what they thought was the best interest of the public in granting one application and denying another," noting that "where a discretion is vested in an administrative board, courts cannot substitute their judgment for that of an administrative body." One member of the court, in dissent, found nothing in the statute granting rule-making power in connection with licensing; even if granted, he would have found the statute unconstitutional as containing no standards for guiding the agency in making rules pursuant to granting and denying licenses. The majority found such rule-making power and also found the limiting standard of the "public interest" was impliedly contained in the act. The dissenting member of the court would also have found a gross abuse of discretion on the part of the Commission both with respect to its interpretation of the statute and its findings of fact thereunder.

Local Government

*Alvin B. Rubin**

IMPLIED LIMITATIONS ON MUNICIPAL AUTHORITY

Even a municipal ordinance clearly within the power conferred upon the municipality by its charter may be invalid if the ordinance is contrary to a state statutory provision or if the

37. 5 U.S.C. § 1003 (1952).

38. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 329, 330, § 2(3) (1944).

Legislature has adopted a comprehensive statutory plan governing the same matter.¹ This well-established rule has created repeated problems in various states, for, while the rule is clear, its scope leaves a wide range for judicial discretion in applying the rule. Two cases decided in the last term illustrate some of the problems which arise.

The act creating the Office of State Fire Marshal prohibits the storing of trash or other combustible material within thirty feet of a building for a period longer than twelve hours or overnight.² Shreveport adopted a municipal ordinance creating the office of Chief of the Fire Prevention Bureau. The ordinance prohibited the storing of combustible material in any building or upon any premises within any residential area without a permit from the Chief of the Fire Prevention Bureau. It provided that "it shall be a violation of this ordinance, after proper and legal notice has been given, . . . to permit any such materials to remain for more than twenty-four (24) hours on any premises or in any building located within any residential area." A person found guilty of violation of the ordinance contended that the ordinance "transcends the power of the city" because the ordinance penalized conduct which was not an offense under the state statute. Under the state statute, the argument ran, a business located in a residential area is exempt from prosecution.

The court held that the state law "is not a comprehensive fire code but purports to regulate the larger public buildings . . . and it does not prevent municipalities from establishing comprehensive fire regulations." Municipalities may enact laws to supplement the state statute provided they do not conflict with the provisions of the state law upon the same subject and provided the municipality was given subordinate authority by city charter to legislate.³

*Member, Baton Rouge Bar; Part-time Professor of Law, Louisiana State University.

1. See, e.g., *Pipoly v. Benson*, 20 Cal.2d 366, 125 P.2d 482 (1942); *Nayle v. City of Grand Island*, 144 Neb. 67, 12 N.W.2d 540 (1943); *State ex rel. Arey v. Sherill*, 142 Ohio St. 574, 53 N.E. 501 (1944); *Reutener v. Cleveland*, 107 Ohio St. 117, 141 N.E. 27 (1923).

2. LA. R.S. 40:1605 (1950).

3. *Shreveport v. Provenza*, 231 La. 514, 518, 91 So.2d 777, 778 (1956). Ordinances adopted in the exercise of police power to meet particular local needs, and in the furtherance of state policy as expressed through existing statutes, will be sustained in the absence of *direct* conflict. See *Baton Rouge v. Rebowe*, 226 La. 186, 75 So.2d 239 (1954); *City of Minden v. Warren*, 199 La. 494, 6 So.2d 558 (1942); *State ex rel. Sutton v. Caldwell*, 195 La. 507, 197 So. 214 (1940).

Under the rule laid down in the court's prior decisions,⁴ there could be little doubt that the state statute failed to preempt the field. But the application of the rule is not always so clear.⁵

A similar question was raised in *City of Lafayette v. Elias*.⁶ State law prohibits the sale of beverages with alcoholic content to "any person under the age of 18." The City of Lafayette adopted an ordinance prohibiting the sale of alcoholic beverages "to any person below the age of 21 years." The court repeated the views expressed in an earlier case that "a municipality with subordinate authority to legislate . . . may make such new and additional regulations in furtherance of the purpose of state law as may seem fit and appropriate to the necessities of the locality and be not in themselves unreasonable."⁸ The ordinance was found to be "appropriate to the necessities of the locality and not in itself unreasonable." Justice Simon dissented on the basis that "the municipality has declared unlawful that which the State and this Court have declared to be lawful."

VALIDITY OF ORDINANCES

In *Doll v. The Flintkote Co.*⁹ the plaintiff sought to set aside an exchange of property between the City of New Orleans and a private corporation, on the ground that the City Council had not properly authorized the exchange of the property owned by the city, formerly the right of way of a street. The Charter of the City of New Orleans permits the Commission "by a two-thirds vote to sell or change the destination of any street."¹⁰ The

4. *Baton Rouge v. Rebowe*, 226 La. 186, 75 So.2d 239 (1954); *State ex rel. Sutton v. Caldwell*, 195 La. 507, 197 So. 214 (1940).

5. In a discussion of "Limitation of Municipal Action by State Law" before the Louisiana City Attorneys Association several years ago, Mr. R. Gordon Kean, Jr., attorney for the City of Baton Rouge and the Parish of East Baton Rouge, reviewed numerous cases involving the problem. He concluded that: (1) The municipal ordinance cannot prohibit what the state law permits, particularly in fields of general state policy. See *Loewenberg v. Fidelity Union Casualty Co.*, 147 So. 81 (La. App. 1933) (wherein a Shreveport ordinance establishing a driving age greater than that fixed by state law was held invalid); *City of Minden v. David Bros. Drug Co.*, 195 La. 791, 197 So. 505 (1940) (where a municipal ordinance requiring a registration of physicians in a dry ward was held invalid as contrary to the "policy of exempting such persons as set forth in the local option law"). (2) A state statute occupying the whole legislative field will control. See *New Orleans v. Ernst*, 155 La. 426, 99 So. 391 (1923) (where ordinance held invalid because same subject regulated by the State Board of Health under the State Sanitary Code; the court found the statutes conferred full supervision of the entire subject matter upon the state).

6. LA. R.S. 26:285 (1950).

7. 232 La. 700, 95 So.2d 281 (1957).

8. *State ex rel. Sutton v. Caldwell*, 195 La. 507, 518, 197 So. 214, 218 (1940).

9. 231 La. 241, 91 So.2d 24 (1956).

10. La. Acts 1912, No. 159, § 8, p. 265, as amended by La. Acts 1948, No. 378, § 8, p. 1018.

plaintiff contended that the statute required a favorable vote by two-thirds of all of the elected members of the Commission Council, hence a vote by six of the eight elected persons. The court held, however, that the statute required only a two-thirds vote of a quorum, and hence the favorable vote of five members at a meeting attended by only five members of the council was sufficient. This is in accordance with the prior jurisprudence¹¹ which has construed similar statutory requirements to relate to a quorum and not to the entire elected membership of a public body unless the latter meaning was clearly intended by the statute.

In *City of Pineville v. Tarver*¹² the court held that a municipality exceeded its authority in adopting an ordinance making it "unlawful for any person . . . to . . . use . . . or consume . . . intoxicating liquors . . . within said town." The local option law¹³ permits the prohibition of the *business* of dealing in alcoholic beverages and the ordinance was therefore "clearly ultra vires."

CIVIL SERVICE APPEALS

The court affirmed a ruling of the New Orleans Civil Service Commission, sustaining the action of the superintendent of police in fining a detective and demoting him to the rank of patrolman on the ground that he had been involved in a fight while intoxicated.¹⁴ The court found that there was "some evidence" to support the decision, and restated the rule previously well established that, in such cases, it will not examine the weight to be accorded evidence or the sufficiency of the evidence, its appellate jurisdiction in such matters being limited to "questions of law alone."¹⁵ In another case the court reversed a trial court decision which had ordered a dismissed employee of the Baton Rouge Police Department reinstated with only a suspension from duty, where the employee had been charged with engaging in local political activities in violation of the Municipal Fire and Police Civil Service Law.¹⁶ Where there is cause for disciplinary

11. *State ex rel. Garland v. Guillory*, 184 La. 329, 166 So. 94 (1935); *Warnoch v. City of Lafayette*, 4 La. Ann. 419 (1849). But compare *Miller v. Rapides Parish School Board*, 209 La. 877, 25 So.2d 623 (1946).

12. 231 La. 446, 91 So.2d 597 (1956).

13. La. Acts 1935 (1 E.S.), No. 17, p. 494. The ordinance was adopted under the provisions of that act, which have been superseded by La. Acts 1948, No. 372, p. 996, incorporated as L.A. R.S. 26:581 (1950).

14. *Jordan v. New Orleans Police Department*, 232 La. 926, 95 So.2d 607 (1957).

15. See *id.* at 930, 95 So.2d at 608, and authorities cited therein.

16. *Marchiafava v. Baton Rouge Fire & Police Civil Service Board*, 96 So.2d

action, and the Board acts "in good faith," the question of whether the penalty imposed is excessive is not one for judicial review.¹⁷ In both cases the court followed what appears to be the policy of constitutional and statutory provisions guaranteeing to civil service employees on whom disciplinary action has been taken a fair hearing, but leaving the merits of the controversy to the Civil Service Board. The wisdom of this policy appears indisputable; any other would plunge the courts in every case into detailed consideration of the adequacy or inadequacy of the evidence and the appropriateness or excessiveness of the penalty imposed.

PUBLIC UTILITIES

*Melvin G. Dakin**

In *Southern Bell Telephone & Telegraph Company v. Louisiana Public Service Commission*¹ the court upheld a rate order which represented for this Commission a first full application² of the principles of rate making expounded by Justice Brandeis in his concurring opinion in *Missouri ex rel. Southwestern Bell Telephone Company*³ and subsequently approved in application by the United States Supreme Court in *Federal Power Commission v. Hope Natural Gas Company*.⁴ Excerpts from the *Missouri* concurring opinion state these principles succinctly:

"I differ fundamentally from my brethren concerning the rule to be applied in determining whether a prescribed rate is confiscatory. . . . The so-called rule of *Smyth vs. Ames* is, in my opinion, legally and economically unsound. The thing devoted by the investor to the public use is not specific property, tangible and intangible, but capital embarked in the enterprise. . . . The investor agrees, by embarking capital in a

26 (La. 1957). The Municipal Fire & Police Civil Service Law was created by LA. CONST. art. XIV, § 15.1.

17. LA. CONST. art. XIV, § 31: "This hearing shall be confined to the determination of whether the decision made by the board was in good faith for cause under the provisions of this Section."

*Professor of Law, Louisiana State University.

1. 232 La. 446, 94 So.2d 431 (1957).

2. For an earlier abortive attempt to apply these principles, see *Gulf States Utilities Co. v. Louisiana Public Service Commission*, 222 La. 132, 62 So.2d 250 (1952) commented on in 14 LOUISIANA LAW REVIEW 104 (1953).

3. *Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission of Missouri*, 262 U.S. 276 (1923).

4. 320 U.S. 591 (1944).